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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MELISSA STEPHANIE
PIZARRO,

Plaintiff,

vs.

CAROLYN COLVIN, Acting
Commissioner of Social Security,

Defendant.

) Case No. CV 14-3118 RNB

) ORDER REVERSING DECISION OF
) COMMISSIONER AND REMANDING
) FOR FURTHER ADMINISTRATIVE
) PROCEEDINGS

Plaintiff filed a Complaint herein on April 30, 2014, seeking review of the Commissioner's denial of her application for Supplemental Security Income benefits. In accordance with the Court's Case Management Order, the parties filed a Joint Stipulation on March 2, 2015. Thus, this matter now is ready for decision.¹

¹ As the Court advised the parties in its Case Management Order, the decision in this case is being made on the basis of the pleadings, the administrative record ("AR"), and the Joint Stipulation ("Jt Stip") filed by the parties. In accordance with Rule 12(c) of the Federal Rules of Civil Procedure, the Court has determined which party is entitled to judgment under the standards set forth in 42 U.S.C. § (continued...)

DISPUTED ISSUES

As reflected in the Joint Stipulation, the disputed issues that plaintiff is raising as the grounds for reversal and remand are as follows:

1. Whether the Administrative Law Judge (“ALJ”) made a proper step two determination.
2. Whether the ALJ properly considered the opinions of the treating and examining physicians.
3. Whether the ALJ made a proper adverse credibility determination.
4. Whether the ALJ made a proper step three determination.
5. Whether the ALJ made a proper residual functional capacity (“RFC”) determination as a part of her step five determination.

DISCUSSION

As discussed hereafter, the Court finds that the ALJ failed to provide legally sufficient reasons on which she could properly rely in order to discredit the opinion of one of the four treating and examining physicians whose opinions are at issue in Disputed Issue Two. As a result of the Court’s finding with respect to that part of Disputed Issue Two, it is unnecessary for the Court to reach Disputed Issue Five, which is directed to the ALJ’ RFC determination as a part of her step five determination. As to all of the other disputed issues, the Court concurs with the Commissioner that reversal is not warranted.

A. The ALJ’s adverse credibility determination (Disputed Issue Three)

Disputed Issue Three is directed to the ALJ’s adverse credibility determination

¹(...continued)
405(g).

1 with respect to plaintiff's subjective symptom testimony. (See It Stip at 16-26.)

2 An ALJ's assessment of pain severity and claimant credibility is entitled to
3 "great weight." Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v.
4 Heckler, 779 F.2d 528, 531 (9th Cir. 1986). Under the "Cotton test," where the
5 claimant has produced objective medical evidence of an impairment which could
6 reasonably be expected to produce some degree of pain and/or other symptoms, and
7 the record is devoid of any affirmative evidence of malingering, the ALJ may reject
8 the claimant's testimony regarding the severity of the claimant's pain and/or other
9 symptoms only if the ALJ makes specific findings stating clear and convincing
10 reasons for doing so. See Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986); see
11 also Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996); Dodrill v. Shalala, 12
12 F.3d 915, 918 (9th Cir. 1993); Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir. 1991)
13 (en banc).

14 Plaintiff alleged that she could not work because of anxiety, neck pain, severe
15 muscle spasms in her neck and back, a tear in her spinal core membrane, and
16 scoliosis. (See AR 97, 127, 136.) Plaintiff testified at the hearing that on account of
17 her conditions, she found it difficult to leave home and was limited to sitting for 10-
18 15 minutes at a time and walking for 15 minutes at a time. (See AR 97, 99, 102.)
19 Plaintiff also testified that she had a headache lasting half a day once per week, that
20 she had tingling in her left arm and spasms in her shoulders, and that she had
21 problems turning her neck. (See AR 108-10.)

22 The ALJ found that, although plaintiff's medically determinable impairments
23 could reasonably be expected to cause the alleged symptoms, plaintiff's statements
24 concerning the intensity, persistence, and limiting effects of these symptoms were not
25 credible to the extent they were inconsistent with the ALJ's residual functional
26 capacity assessment. (See AR 27.) In support of this adverse credibility
27 determination, the ALJ provided seven reasons drawn from two broad categories:
28 plaintiff's testimony was inconsistent with or unsupported by the objective medical

1 evidence; and there were inconsistencies within the testimony itself. (See AR 27-29.)
2 The Court finds that, although one of the seven reasons was legally insufficient, the
3 error was harmless because the remaining six reasons were legally sufficient.

4 One of the reasons proffered by the ALJ was that there was an inconsistency
5 between the number of pills in plaintiff's prescription bottles (which she had
6 presented at her administrative hearing) and plaintiff's allegation that she had been
7 compliant with her medications. (See AR 28-29; see also AR 99-101.) The ALJ
8 found that there were fewer pills than expected and that plaintiff failed to explain this
9 discrepancy. (See AR 29.) To the contrary, the record reflects that plaintiff did
10 explain this discrepancy by testifying that she had fewer pills than expected because
11 her mother manages her medications and because her physician directed her to take
12 additional pills if she had an anxiety attack. (See AR 100-01.) Since the ALJ
13 ignored these explanations, the Court finds that this was not a legally sufficient
14 reason on which the ALJ could properly rely in support of her adverse credibility
15 determination.

16 Another similar reason proffered by the ALJ was that plaintiff's complaints
17 were inconsistent with or unsupported by the objective medical evidence: the ALJ
18 specifically noted that the evidence reflected only mild degeneration in the cervical
19 spine; that there was no evidence of degeneration in her shoulder or left arm; and that
20 laboratory testing repeatedly was negative or normal. (See AR 27; see also AR 333,
21 366, 401, 455, 462.) The Court finds that this was a legally sufficient reason on
22 which the ALJ could properly rely in support of her adverse credibility determination.
23 See Morgan v. Comm'r of Soc. Sec., 169 F.3d 595, 600 (9th Cir. 1999) (ALJ may
24 properly consider conflict between claimant's testimony of subjective complaints and
25 objective medical evidence in the record); Tidwell v. Apfel, 161 F.3d 599, 602 (9th
26 Cir. 1998) (ALJ may properly rely on weak objective support for the claimant's
27 subjective complaints); Orteza v. Shalala, 50 F.3d 748, 750 (9th Cir. 1995) (ALJ may
28 properly rely on lack of objective evidence to support claimant's subjective

1 complaints); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1986) (noting that “a
2 claimant’s self-serving statements may be disregarded to the extent they are
3 unsupported by objective findings”).

4 Another similar reason proffered by the ALJ was that there was no medical
5 evidence supporting some of plaintiff’s other physical complaints: the ALJ
6 specifically noted that (1) there was no evidence of a severe impairment affecting
7 plaintiff’s lumbar or thoracic spine; (2) there was only normal neurological testing
8 despite plaintiff’s complaints of left-sided pain with numbness; and (3) there was no
9 imaging evidence to confirm a medically determinable impairment affecting the upper
10 or lower extremities. (See AR 28; see also AR 333, 461-62, 719, 738.) The Court
11 finds that this also was a legally sufficient reason on which the ALJ could properly
12 rely in support of her adverse credibility determination.

13 Another reason proffered by the ALJ was that plaintiff made inconsistent
14 statements regarding the cause and onset date of her impairments and had made no
15 offer of proof to clarify the inconsistencies. (See AR 27-28.) Specifically, the ALJ
16 noted unresolved inconsistencies from plaintiff’s reports that her conditions were
17 caused by: a fall in the shower in 2008; a head injury when she tried to perform
18 handstands at 11 years old (in 1997); a sudden onset of back pain radiating to her
19 shoulders when she was studying in approximately July 2008; a fractured tail bone
20 at 8 years old and a neck injury while she was standing on her head sometime in
21 adulthood; chronic neck and back pain from a childhood car accident; and
22 musculoskeletal abnormalities since the age of 2 months. (See id.; see also AR 215,
23 426, 514, 568, 623, 644.) Although plaintiff disputes these inconsistencies on the
24 basis that her conditions allegedly accrued gradually (see Joint Stip at 18), the Court
25 concurs with the ALJ’s basic conclusion that plaintiff’s statements reflected an
26 inconsistency between plaintiff’s statements to some providers that her conditions
27 began suddenly in adulthood and her statements to other providers that her conditions
28 arose from childhood accidents. (See AR 28; Compare AR 426, 514 with AR 623,

644.) Accordingly, the Court finds that this also was a legally sufficient reason on which the ALJ could properly rely in support of her adverse credibility determination. See Tonapetyan v. Halter, 242 F.3d 1144, 1148 (9th Cir. 2001) (ALJ may use “ordinary techniques of credibility evaluation,” such as considering the claimant’s reputation for truthfulness and any inconsistent statements in her testimony); Smolen, 80 F.3d at 1284 (ALJ may consider “prior inconsistent statements concerning the symptoms, and other testimony by the claimant that appears less than candid”); Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995) (ALJ may properly rely on inconsistencies in the claimant’s testimony); Bunnell, 947 F.2d at 346 (“[T]he adjudicator may discredit the claimant’s allegations based on inconsistencies in the testimony or on relevant character evidence.”).

Another similar reason proffered by the ALJ was that there was an inconsistency between plaintiff’s allegations of extreme pain and her admissions that she had a good response and improved functioning due to medication and physical therapy. (See AR 28; see also AR 97, 493-94.) The Court finds that this also was a legally sufficient reason on which the ALJ could properly rely in support of her adverse credibility determination.

Another similar reason proffered by the ALJ was that there was an inconsistency between plaintiff’s testimony that she had extreme panic/depressive symptoms and her statements to mental health providers that she went out more with her family, became more involved with group therapy, and essentially went outside the house more often. (See AR 28; see also AR 97, 696.) The Court finds that this also was a legally sufficient reason on which the ALJ could properly rely in support of her adverse credibility determination.

Another similar reason proffered by the ALJ was that plaintiff appeared to have misrepresented the status of her alcohol abuse. (See AR 29.) Specifically, the ALJ noted that plaintiff had told a mental health provider on August 3, 2012 that she did not abuse alcohol, but she had then testified at the administrative hearing on August

30, 2012 that she continues to abuse alcohol despite taking prescription mood stabilizing medication. (See id.; see also AR 81, 749.) The Court finds that this also was a legally sufficient reason on which the ALJ could properly rely in support of her adverse credibility determination. See Thomas v. Barnhart, 278 F.3d 947, 959 (9th Cir. 2002) (claimant's presentation of conflicting information about her drug and alcohol usage was a clear and convincing reason to discount her testimony); see also Verduzco v. Apfel, 188 F.3d 1087, 1090 (9th Cir. 1999) (relying on inconsistent statements about alcohol use to reject claimant's testimony).

In conclusion, the Court finds that even if the ALJ did err in relying on one of her seven stated reasons in support of her adverse credibility determination, the error was harmless because the ALJ's six other stated reasons and ultimate credibility determination were supported by substantial evidence. See Carmickle v. Comm'r, Social Sec. Admin., 533 F.3d 1155, 1162-63 (9th Cir. 2008) (holding that ALJ's reliance on two invalid reasons in support of adverse credibility determination was harmless where remaining reasons were adequately supported by substantial evidence).

B. The ALJ's step two determination (Disputed Issue One)

Disputed Issue One is directed to the ALJ's inclusion of plaintiff's alcohol abuse in her step two determination. (See It Stip at 2-6.)

Step two of the Commissioner's sequential evaluation process requires the ALJ to determine whether an impairment is severe or not severe. See 20 C.F.R. §§ 404.1520(a), 416.920(a). The Social Security Regulations and Rulings, as well as case law applying them, discuss the step two severity determination in terms of what is "not severe." According to the Commissioner's regulations, an impairment is not severe if it does not significantly limit the claimant's physical or mental ability to do basic work activities." See 20 C.F.R. §§ 404.1520(c), 404.1521(a), 416.920(c), 416.921(a). Basic work activities are "abilities and aptitudes necessary to do most

1 jobs,” including “[p]hysical functions such as walking, standing, sitting, lifting,
2 pushing, pulling, reaching, carrying, or handling.” Basic work activities also include
3 mental activities such as understanding, carrying out, and remembering simple
4 instructions; use of judgment; responding appropriately to supervision, co-workers,
5 and usual work situations; and dealing with changes in a routine work setting. See
6 20 C.F.R. §§ 404.1521(b), 416.921(b); Social Security Ruling (“SSR”) 85-28.² The
7 Ninth Circuit has described step two as “a de minimis screening device to dispose of
8 groundless claims.” See Smolen, 80 F.3d at 1290; see also Webb v. Barnhart, 433
9 F.3d 683, 687 (9th Cir. 2005).

10 The crux of plaintiff’s contention is the ALJ should not have classified alcohol
11 abuse as one of her severe impairments because the record contains no definitive
12 diagnosis of alcohol abuse, but only an initial diagnosis that appeared to have been
13 subsequently ruled out. (See Jt Stip at 2-3; see also AR 669, 681.) Although the
14 Court concurs with plaintiff that an ALJ’s step two determination must be supported
15 by evidence of a medically determinable impairment corroborated by objective
16 diagnostic testing, see Ukolov v. Barnhart, 420 F.3d 1002, 1005-06 (9th Cir. 2005),
17 the Court fails to see how any error by the ALJ in this regard had any effect on the
18 ALJ’s sequential evaluation process. No limitations from alcohol abuse were
19 incorporated in the ALJ’s RFC determination, her step four determination, or her step
20 five determination. Moreover, although plaintiff contends that the ALJ’s finding of
21 alcohol abuse tainted her adverse credibility determination (see Jt Stip at 6), the Court
22 notes that the only reason proffered by the ALJ that was implicated by evidence of
23 plaintiff’s alcohol use was that plaintiff had made inconsistent statements about her
24 alcohol use, a reason that the Court has found was supported by substantial evidence.

25 Accordingly, the Court finds that, to the extent that the ALJ erred in classifying
26

27 ² Social Security Rulings are binding on ALJs. See Terry v. Sullivan, 903
28 F.2d 1273, 1275 n.1 (9th Cir. 1990).

1 alcohol abuse as a “severe” impairment in her step two determination, any error in
 2 this regard was harmless. See Stout v. Commissioner of Social Security, 454 F.3d
 3 1050, 1055 (9th Cir. 2006) (an ALJ’s error is harmless when the error is
 4 inconsequential to the ultimate non-disability determination); Curry v. Sullivan, 925
 5 F.2d 1127, 1131 (9th Cir. 1991) (harmless error rule applies to review of
 6 administrative decisions regarding disability).

7
 8 **C. The ALJ’s step three determination (Disputed Issue Four)**

9 Disputed Issue Four is directed to the ALJ’s failure to consider whether
 10 plaintiff’s condition met or equaled the requirements of Listing 12.07 (Somatoform
 11 Disorder). (See Jt Stip at 26-28.)

12 At step three of the Commissioner’s sequential evaluation process, the ALJ
 13 must determine whether a claimant’s impairment or combination of impairments
 14 meets or equals a listed impairment set out in 20 C.F.R. Part 404, Subpart P,
 15 Appendix 1. See Tackett v. Apfel, 180 F.3d 1094, 1099 (9th Cir. 1999). To “meet”
 16 a listed impairment, the claimant must establish that he satisfies each element of the
 17 listed impairment in question. See Sullivan v. Zebley, 493 U.S. 521, 530, 110 S. Ct.
 18 885, 107 L. Ed. 2d 967 (1990); Tackett, 180 F.3d at 1099. To “equal” a listed
 19 impairment, a plaintiff “must establish symptoms, signs, and laboratory findings ‘at
 20 least equal in severity and duration’ to the characteristics of a relevant listed
 21 impairment, or, if a claimant’s impairment is not listed, then to the listed impairment
 22 ‘most like’ the claimant’s impairment.” Tackett, 180 F.3d at 1099 (quoting 20 C.F.R.
 23 § 404.1526).

24 The Commissioner’s listings define a somatoform disorder as “physical
 25 symptoms for which there are no demonstrable organic findings or known
 26 psychological mechanisms.” See 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.07. In
 27 pertinent part, a claimant must show under Listing 12.07 that her somatoform
 28 disorder manifests at least two of the following four requirements: (1) marked

1 restriction of activities of daily living; (2) marked difficulties in maintaining social
2 functioning; (3) marked difficulties in maintaining concentration, persistence, or
3 pace; or (4) repeated episodes of decompensation, each of extended duration. See id.

4 As a threshold matter, plaintiff has proffered no evidence that any physician
5 diagnosed her with a somatoform disorder. Although plaintiff points to medical
6 evidence suggesting the possibility of a somatoform disorder (see AR 431, 475), the
7 record also reflects that subsequent medical evidence ruled out a diagnosis of
8 somatoform disorder (see AR 574). Moreover, the record reflects that plaintiff was
9 repeatedly diagnosed with anxiety and depression, which did not fall within the
10 definition of a somatoform disorder. (See AR 17, 601, 655, 669, 705, 710, 723.) In
11 the absence of any convincing evidence that plaintiff had a somatoform disorder, the
12 ALJ did not err in failing to include a discussion of a somatoform disorder as part of
13 her step three determination. See Ellison v. Sullivan, 929 F.2d 534, 537 (10th Cir.
14 1990) (“Given the lack of evidence in the record, the ALJ did not err by not
15 evaluating plaintiff’s condition under section 12.07.”); Burns v. Sullivan, 888 F.2d
16 1218, 1219 (8th Cir. 1989) (finding no error in exclusion of Listing 12.07 in ALJ’s
17 step three determination because the evidence “does not support a finding of
18 somatoform disorder” and the “psychological evaluations diagnosed situational
19 depression, or anxiety, but these diagnoses do not fall within the definition of
20 somatoform disorder”); see also Brown v. Bowen, 864 F.2d 336, 339 (5th Cir. 1988)
21 (where psychologist did not diagnose somatoform disorder, but diagnosed other
22 psychological problems, ALJ finding of not disabled was supported by record).

23 Moreover, even assuming *arguendo* that the record did contain evidence that
24 made it incumbent upon the ALJ to discuss whether plaintiff had an impairment or
25 combination of impairments that met or equaled the requirements of Listing 12.07,
26 the Court finds that the ALJ’s failure to do so was harmless error. As noted above,
27 in order to satisfy the requirements of Listing 12.07, plaintiff was required to show
28 that her somatoform disorder manifested limitations in at least two of the four areas

1 of mental functioning delineated in the listing. The ALJ considered these same four
2 areas with respect to a different listing (i.e., Listing 12.04 [Affective Disorder]) and
3 concluded that plaintiff had not made the requisite showing. (See AR 23-24.) In
4 light of the ALJ's findings under Listing 12.04, it follows that the ALJ would have
5 also found that plaintiff had not made the requisite showing that she met or equaled
6 the requirements of Listing 12.07. See Hall v. Bowen, 857 F.2d 1210, 1212 (8th Cir.
7 1988) (by virtue of ALJ's findings that plaintiff had not shown that she had requisite
8 limitations among the four areas of mental functioning under 12.04, the ALJ could
9 not have found Hall disabled by a somatoform disorder even if he had properly
10 interpreted Listing 12.07); see also Burns, 888 F.2d at 1219 (upholding step three
11 determination as to Listing 12.07 where evidence failed to show requisite limitations
12 in delineated areas of mental functioning).

13
14 **D. The ALJ's consideration of the medical opinion evidence (Disputed Issue**
15 **Two**)

16 Disputed Issue Two is directed to the ALJ's consideration of the opinions of
17 four of plaintiff's treating and examining physicians: Dr. Lee, Dr. Stoltzfus, Dr.
18 Galdjie, and Dr. Riahinejad. (See Jt Stip at 6-16.) As discussed below, the Court
19 finds that the ALJ provided legally sufficient reasons to discredit all of these opinions
20 except for that of Dr. Riahinejad.

21 The law is well established in this Circuit that a treating physician's opinions
22 are entitled to special weight because a treating physician is employed to cure and has
23 a greater opportunity to know and observe the patient as an individual. See
24 McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989). "The treating physician's
25 opinion is not, however, necessarily conclusive as to either a physical condition or the
26 ultimate issue of disability." Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir.
27 1989). The weight given a treating physician's opinion depends on whether it is
28 supported by sufficient medical data and is consistent with other evidence in the

1 record. See 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). If the treating physician's
2 opinion is uncontroverted by another doctor, it may be rejected only for "clear and
3 convincing" reasons. See Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996); Baxter
4 v. Sullivan, 923 F.3d 1391, 1396 (9th Cir. 1991). Where, as here, the treating
5 physicians' opinions are controverted, they may be rejected only if the ALJ makes
6 findings setting forth specific and legitimate reasons that are based on the substantial
7 evidence of record. See, e.g., Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998)
8 ("A treating physician's opinion on disability, even if controverted, can be rejected
9 only with specific and legitimate reasons supported by substantial evidence in the
10 record."); Magallanes, 881 F.2d at 751; Winans v. Bowen, 853 F.2d 643, 647 (9th
11 Cir. 1987).

12 Likewise, to reject the uncontradicted opinion of an examining physician, an
13 ALJ must provide "clear and convincing" reasons. Where, as here, the examining
14 physicians' opinions are contradicted by those of other doctors, the ALJ must provide
15 "specific and legitimate" reasons that are supported by substantial evidence in the
16 record. See Regennitter v. Commissioner of Social Sec. Admin., 166 F.3d
17 1294, 1298-99 (9th Cir. 1999); Lester, 81 F.3d at 830-31; Andrews v. Shalala, 53 F.3d
18 1035, 1041 (9th Cir. 1995); see also Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th
19 Cir. 2005).

20
21 Dr. Lee

22 Dr. Lee, a treating physician, issued an opinion in November 2009 stating that
23 plaintiff had a trapezius muscle spasm, that she had a "very good" response to
24 physical therapy, and that her prognosis was "very good." (See AR 492-94.)
25 Approximately seven months later, in June 2010, Dr. Lee issued another opinion with
26 a different conclusion: as support for plaintiff's request for an accommodation at
27 college, Dr. Lee stated that plaintiff had a "permanent/chronic" disability, needed to
28 sit in an ergonomic chair, was unable to read or write notes because she was unable

1 to sit for prolonged periods or bend her neck forward, and needed to be able to listen
2 to audiotapes of lectures. (See AR 576.)

3 At issue here is Dr. Lee's June 2010 opinion, to which the ALJ declined to give
4 great weight for two stated reasons. (See AR 31.) First, the ALJ found that the
5 opinion was issued so that plaintiff could obtain an accommodation for her classes
6 but contained no functional capacity assessment with regard to her ability to sustain
7 activity for 8 hours in a standard workday or for 40 hours in a standard workweek.
8 (See id.) The Court finds that this was a legally sufficient reason on which the ALJ
9 could properly rely to decline to give great weight to Dr. Lee's June 2010 opinion.
10 See Morgan, 169 F.3d at 601 (ALJ properly discounted opinion of treating physician
11 who failed to "show how Morgan's symptoms translate into specific functional
12 deficits which preclude work activity" and who "did not explain *how* these
13 characteristics precluded work activity in Morgan's case") (emphasis in original).

14 Second, the ALJ found that Dr. Lee's June 2010 opinion was inconsistent with
15 Dr. Lee's November 2009 opinion, which reflected significant improvement. (See
16 AR 31.) The Court finds that this also was a legally sufficient reason on which the
17 ALJ could properly rely to decline to give great weight to Dr. Lee's June 2010
18 opinion. See Young v. Heckler, 803 F.2d 963, 967 (9th Cir. 1986) (substantial
19 evidence supported non-disability determination where treating physician's form
20 indicating claimant was "totally disabled" contradicted earlier medical reports,
21 including those of physician himself); see also Valentine v. Commissioner Social Sec.
22 Admin., 574 F.3d 685, 692 (9th Cir. 2009) (ALJ properly "identified a contradiction"
23 within treating medical opinion before rejecting it); Morgan, 169 F.3d at 603 (ALJ
24 properly rejected treating medical opinion that was inconsistent with itself and with
25 other reports).

26
27 Dr. Stoltzfus

28 Dr. Stoltzfus, a treating psychologist, issued a Mental Residual Functional

1 Capacity Questionnaire in March 2011. (See AR 599-603.) In the questionnaire, Dr.
2 Stoltzfus stated that he was basing his opinions on two visits with plaintiff (in
3 September 2009 and November 2009), that plaintiff exhibited several mental
4 symptoms, that she was “unable to meet competitive standards” in several areas of
5 mental functioning, and that she would be absent from work more than 4 days per
6 month. (See id.)

7 The ALJ provided three reasons for declining to give Dr. Stoltzfus’s opinion
8 great weight. (See AR 31.) The Court finds that, although the first reason was legally
9 insufficient, the error was harmless because the two remaining reasons were legally
10 sufficient.

11 First, the ALJ discredited Dr. Stoltzfus’s 2011 opinion because it was issued
12 after he had only two visits with plaintiff in 2009. (See id.; see also AR 599.) To the
13 extent that the ALJ rejected Dr. Stoltzfus’s opinion because he only saw plaintiff
14 twice or because the opinion was issued retroactively, the Court finds that neither
15 ground was a legally sufficient basis on which the ALJ could properly rely to
16 discredit the opinion. See Ghokassian v. Shalala, 41 F.3d 1300, 1303 (9th Cir. 1994)
17 (opinion of physician who saw claimant twice within 14-month period was entitled
18 to consideration as treating physician’s opinion); Morgan, 169 F.3d at 601 (“[T]he
19 circumstance of a retroactive diagnosis, standing alone, may not be sufficient to
20 discount the opinion of a treating physician.”).

21 Second, the ALJ noted that plaintiff was taking no prescription mood
22 stabilizing medication at the time of Dr. Stoltzfus’s treatment. (See AR 31.) The
23 Court concurs with this reason because the record reflects that Dr. Stoltzfus left blank
24 the question about plaintiff’s prescribed medications (see AR 599) and that plaintiff
25 did not even begin to receive regular psychiatric treatment (with a different medical
26 provider) until after her visits with Dr. Stoltzfus in 2009 (see AR 605-09). See 20
27 C.F.R. §§ 404.1527(c)(2)(ii), 416.927(c)(2)(ii) (weight accorded to medical opinion
28 may depend on the type of treatment that the physician has provided); see generally

1 Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001) (ALJ properly rejected
2 treating medical opinion that was not supported by recommendations and treatment
3 commensurate with disability); Warre v. Commissioner of Social Sec. Admin., 439
4 F.3d 1001, 1006 (9th Cir. 2006) (“Impairments that can be controlled effectively with
5 medication are not disabling for the purpose of determining eligibility for SSI
6 benefits.”).

7 Third, the ALJ found that there was insufficient clinical medical evidence to
8 project Dr. Stoltzfus’s evaluation as valid for more than a 12 month period, or that the
9 limitations he assessed would be valid at the time he actually completed the
10 evaluation. (See AR 31.) The Court notes that Dr. Stoltzfus’s opinion in this regard
11 is susceptible to different interpretations because, although Dr. Stoltzfus did state that
12 plaintiff’s impairments would be expected to last for at least 12 continuous months,
13 Dr. Stoltzfus was unable to state when plaintiff’s limitations began or what treatment
14 plaintiff was receiving. (See AR 509, 603.) The Court finds that in light of Dr.
15 Stoltzfus’s lack of knowledge about these critical facts about plaintiff’s impairment,
16 the ALJ’s interpretation of this part of Dr. Stoltzfus’s opinion as not supported by
17 sufficient clinical medical evidence was rational and must be upheld. See Burch v.
18 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005) (“Where evidence is susceptible to more
19 than one rational interpretation, it is the ALJ’s conclusion that must be upheld.”); see
20 also 20 C.F.R. §§ 404.1527(c)(2)(ii), 416.927(c)(2)(ii) (weight accorded to medical
21 opinion may depend on physician’s depth of knowledge about the claimant’s
22 impairment).

23 In conclusion, as to Dr. Stoltzfus, the Court finds that, although the ALJ
24 proffered one legally insufficient reason to accord little weight to his opinion, the
25 error was harmless because the ALJ also proffered two independent, legally sufficient
26 reasons supported by substantial evidence. See Howell v. Commissioner Social Sec.
27 Admin., 349 Fed. Appx. 181, 184 (9th Cir. 2009) (now citable for its persuasive value
28 per Ninth Circuit Rule 36-3) (ALJ’s erroneous rationale for rejecting treating

1 physician's opinion was harmless because the ALJ otherwise provided legally
2 sufficient reasons to reject opinion) (citing Stout, 454 F.3d at 1054); Donathan v.
3 Astrue, 264 Fed. Appx. 556, 559 (9th Cir. 2008) (ALJ's erroneous characterization
4 of treating physicians' opinions was harmless "because the ALJ provided proper,
5 independent reasons for rejecting these opinions").

6
7 Dr. Galdjie

8 Dr. Galdjie, an examining orthopedic surgeon, issued an opinion based on an
9 evaluation of plaintiff he conducted in June 2011. (See AR 623-26.) During the
10 examination, Dr. Galdjie noted that he did not have an opportunity to review all of
11 plaintiff's medical records and that some parts of the examination could not be
12 completed because plaintiff complained of pain upon being touched. (See AR 623-
13 25.) In his opinion, Dr. Galdjie (1) rendered a diagnosis of "significant subjective
14 symptoms with minimal objective findings"; and (2) recommended a psychological
15 examination because he believed "that psychologically she is totally disabled at this
16 point" (with the admission that he was not a psychological expert). (See AR 626.)
17 In an accompanying questionnaire, Dr. Galdjie opined that plaintiff could sit, stand,
18 or walk for one hour in an eight-hour workday. (See AR 632.)

19 The ALJ declined to give great weight to Dr. Galdjie's opinions because Dr.
20 Galdjie had admitted that his examination was not complete and that his assessment
21 was based largely on plaintiff's subjective complaints, which the ALJ had found were
22 less than entirely credible. (See AR 32; see also AR 626.) The Court concurs. Since
23 the Court has found, as discussed above, that the ALJ proffered legally sufficient
24 reasons for her adverse credibility determination with respect to plaintiff's subjective
25 symptom complaints, the Court finds that the fact that Dr. Galdjie largely relied on
26 those complaints constituted a legally sufficient reason on which the ALJ could
27 properly rely to decline to give great weight to Dr. Galdjie's opinions. See
28 Tommasetti v. Astrue, 533 F.3d 1035, 1041 (9th Cir. 2008) (an ALJ may reject a

1 medical opinion if it is based to a large extent on a claimant's self-reports that have
2 been properly discounted as incredible).

3
4 Dr. Riahinejad

5 Dr. Riahinejad, an examining psychologist, issued an opinion based on a
6 psychological evaluation conducted in January 2012. (See AR 650-56.) In his
7 opinion, Dr. Riahinejad stated that plaintiff had a depressive disorder and anxiety
8 disorder resulting in the following abilities and limitations: she was capable of
9 understanding, remembering, and carrying out simple and repetitive instructions; she
10 had significant difficulty understanding, remembering, and carrying out complex and
11 detailed instructions; and she was very limited in persistence due to her physical
12 conditions. (See AR 655.)

13 The ALJ declined to give great weight to Dr. Riahinejad's opinion as to
14 plaintiff's inability to complete complex and detailed instructions because Dr.
15 Riahinejad's assessment purportedly was based largely on plaintiff's subjective
16 complaints, which the ALJ had found were less than entirely credible. (See AR 33.)
17 Here, however, the ALJ's characterization of Dr. Riahinejad's opinion is not
18 supported by the record, which reflects that Dr. Riahinejad's opinion was based more
19 heavily on his own clinical observations than on plaintiff's self-reports. Specifically,
20 the record reflects that Dr. Riahinejad conducted an extensive review of plaintiff's
21 medical records and conducted a complete mental status examination that included
22 a battery of objective psychological testing. (See AR 652-55.) Accordingly, the
23 Court finds that this was not a legally sufficient reason on which the ALJ could
24 properly rely to discredit Dr. Riahinejad's opinion. See Ghanim v. Colvin, 763 F.3d
25 1154, 1164 (9th Cir. 2014) ("[W]hen an opinion is not more heavily based on a
26 patient's self-reports than on clinical observations, there is no evidentiary basis for
27 rejecting the opinion.") (citing Ryan v. Commissioner of Social Sec., 528 F.3d 1194,
28 1199 (9th Cir. 2008)).

1 Although the Commissioner contends that any error by the ALJ in failing to
2 properly consider Dr. Riahinejad's opinion was harmless error because the ALJ's
3 eventual RFC determination incorporated all of Dr. Riahinejad's limitations (see Jt
4 Stip at 13-14), the Court disagrees. Although both the ALJ's RFC determination and
5 Dr. Riahinejad's opinion essentially posited a limitation to simple and routine tasks,
6 Dr. Riahinejad made the additional finding that plaintiff was "very limited" in
7 persistence. Since Dr. Riahinejad's opinion as to this additional limitation in
8 persistence was not adequately captured by the ALJ's RFC determination, it was
9 incumbent upon the ALJ to provide legally sufficient reasons for rejecting it. The
10 ALJ did not provide any such reasons here. See Lubin v. Commissioner of Social
11 Sec. Admin., 507 Fed. Appx. 709, 712 (9th Cir. 2013) (RFC determination and
12 hypothetical question limiting claimant to "one to three step tasks" did not adequately
13 capture moderate limitation in concentration, persistence, or pace); Brink v.
14 Commissioner Social Sec. Admin., 343 Fed. Appx. 211, 212 (9th Cir. 2009)
15 (hypothetical question limiting claimant to "simple, repetitive work" did not
16 adequately capture moderate limitations in concentration, persistence, or pace);
17 Newton v. Chater, 92 F.3d 688, 695 (8th Cir. 1996) (hypothetical question positing
18 an individual with a capacity for simple jobs did not adequately capture deficiencies
19 in concentration, persistence, or pace); see also Lester, 81 F.3d at 830 (an ALJ must
20 provide "specific and legitimate reasons supported by substantial evidence in the
21 record" to reject the opinion of an examining physician, even if contradicted by
22 another physician).

23 24 CONCLUSION AND ORDER

25 The law is well established that the decision whether to remand for further
26 proceedings or simply to award benefits is within the discretion of the Court. See,
27 e.g., Salvador v. Sullivan, 917 F.2d 13, 15 (9th Cir. 1990); McAllister, 888 F.2d at
28 603; Lewin v. Schweiker, 654 F.2d 631, 635 (9th Cir. 1981). Remand is warranted

1 where additional administrative proceedings could remedy defects in the decision.
2 See, e.g., Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984); Lewin, 654 F.2d at
3 635. Remand for the payment of benefits is appropriate where no useful purpose
4 would be served by further administrative proceedings, Kornock v. Harris, 648 F.2d
5 525, 527 (9th Cir. 1980); where the record has been fully developed, Hoffman v.
6 Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); or where remand would unnecessarily
7 delay the receipt of benefits, Bilby v. Schweiker, 762 F.2d 716, 719 (9th Cir. 1985).

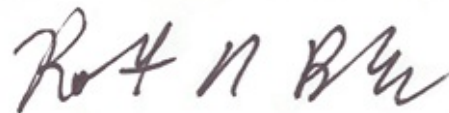
8 Where, as here, a claimant contends that she is entitled to an award of benefits
9 because of an ALJ's failure to properly consider the medical opinion evidence, the
10 Court applies a three-step framework. See Treichler v. Commissioner of Social Sec.
11 Admin., 775 F.3d 1090, 1099-1102 (9th Cir. 2014); see also Burrell v. Colvin, 775
12 F.3d 1133, 1141-42 (9th Cir. 2014); Garrison v. Colvin, 759 F.3d 995, 1020 (9th Cir.
13 2014). First, the Court asks whether the ALJ failed to provide legally sufficient
14 reasons for rejecting evidence, whether claimant testimony or medical opinion.
15 Second, the Court determines whether the record has been fully developed, whether
16 there are outstanding issues that must be resolved before a determination of disability
17 can be made, and whether further administrative proceedings would be useful. Third,
18 if the Court concludes that no outstanding issues remain and further proceedings
19 would not be useful, the Court may find the relevant testimony credible as a matter
20 of law and then determine whether the record, taken as a whole, leaves "not the
21 slightest uncertainty as to the outcome of the proceeding." Treichler, 775 F.3d at
22 1100-01 (citations omitted). Only when all three elements are satisfied does a case
23 raise the "rare circumstances" that allow the Court to exercise its discretion to remand
24 for an award of benefits. See id.

25 Here, the Court finds that the second element has not been satisfied because
26 outstanding issues remain and further administrative proceedings would be useful.
27 Specifically, the most essential factual issue – whether plaintiff is disabled – remains
28 unresolved because the record is unclear and contains conflicting evidence on that

1 issue. See Treichler, 775 F.3d at 1101 (remand for award of benefits is inappropriate
 2 where “there is conflicting evidence, and not all essential factual issues have been
 3 resolved”) (citation omitted); see also Strauss v. Commissioner of the Social Sec.
 4 Admin., 635 F.3d 1135, 1138 (9th Cir. 2011) (same where the record does not
 5 demonstrate the claimant is disabled within the meaning of the Social Security Act).
 6 More specifically, the Court notes that the record contains no vocational expert
 7 testimony reflecting that a person could not work with the limitations described by
 8 Dr. Riahinejad. See Harman v. Apfel, 211 F.3d at 1172, 1180 (9th Cir. 2000)
 9 (remanding for further proceedings in part because there was no testimony from the
 10 vocational expert that the limitations established by the improperly discredited
 11 evidence would render claimant unable to engage in any work).

12 Therefore, based on its review and consideration of the entire record, the Court
 13 has concluded on balance that a remand for further administrative proceedings
 14 pursuant to sentence four of 42 U.S.C. § 405(g) is warranted here. Accordingly, IT
 15 IS HEREBY ORDERED that Judgment be entered reversing the decision of the
 16 Commissioner of Social Security and remanding this matter for further administrative
 17 proceedings.³

18
 19 DATED: March 19, 2015



20
 21
 22 **ROBERT N. BLOCK**
 UNITED STATES MAGISTRATE JUDGE

23
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 25
 26
 27
 28 ³ It is not the Court’s intent to limit the scope of the remand.